United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1462 ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

In re

MELVIN LICHT,

Bankrupt,

MELVIN LICHT,

Appellant,

vs.

HERBERT L. ASH, as Trustee in Bankruptcy of the Estate of Melvin Licht, Bankrupt,

Appellee.

On Appeal from the United States District Court for the Eastern District of New York.

UNITED STATES COURT OF APPEALS
FILED
JUL 30 1974
SECOND CIRCUIT

BRIEF FOR APPELLEE

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MISCELLANEOUS:

UNITED STATES COURT OF APPEALS
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- x

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Docket No.

74-1462

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MELVIN LICHT, Bankrupt,

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-against-

HERBERT L. ASH, as Trustee in Bankruptcy of the Estate of Melvin Licht, Bankrupt,

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- x

APPELLEE'S BRIEF

Preliminary Statement

Appellant, Melvin Licht, the bankrupt herein ("bankrupt"), has noticed an appeal from the memorandum decision and order of the Honorable Mark A. Costantino, United States District Judge for the Eastern District of New York, which affirmed the order of the Honorable Manuel J. Price, Bankruptcy Judge, dated April 4, 1973, granting the appellee-trustee's motion to amend his specifications of objection to the bankrupt's discharge and the order of Judge Price, dated April 17, 1973, denying the bankrupt a discharge.

This memorandum of law is submitted on behalf of appellee, Herbert L. Ash, trustee of the above named bankrupt estate ("trustee") and in opposition to this appeal.

Facts

The bankrupt was vice-president and general manager of John Licht, Inc., since 1950, which had been founded by

his father, John Licht (A123-124)*. However, for some years prior to June 1, 1967, the date upon which John Licht, Inc. filed a petition for an arrangement pursuant to Chapter XI of the Bankruptcy Act, John Licht had not been active in the management of the corporation.

John Licht, Inc., was a large wholesale distributor of automobile supplies and accessories. During the entire period of the bankrupt's management of John Licht, Inc., the corporation was financed by means of large bank loans which it had to pay off periodically. In 1965 or early 1966, John Licht, Inc. borrowed $425,000 from Franklin National Bank ("Franklin") on an unsecured basis, which loan was due on November 1, 1966. Prior to the due date, Franklin insisted that the loan be paid and that it remain off the bank's books for a period of thirty days (A126-128).

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* The numbers in parenthesis following the letter "A" refer to pages of the Appendix.

In order to raise sufficient cash to pay off the Franklin loan, the bankrupt purchased large quantities of merchandise, on behalf of John Licht, Inc. from A. C. Division of General Motors ("A.C."), General Electric Company ("General Electric") and the Westinghouse Corporation ("Westinghouse"), on extended credit terms. The bankrupt then caused John Licht, Inc. to sell said merchandise to its customers at or below cost in order to raise cash quickly to pay off the loan (A 77-88 and A158-161).

The Franklin loan was paid off on November 1, 1966. However, on November 30, 1966, the bankrupt was advised by Franklin that it would only grant a new loan to the extent of $200,000. The bankrupt claims that the bank reduced the size of the loan because Admiral Automotive Company ("Admiral") a large customer of John Licht, Inc., which owed it a substantial sum of money and some of whose notes had been discounted by Franklin, had been accused of receiving a carload of stolen merchandise (A 99-101 and A 128-129).

Franklin's refusal to lend John Licht, Inc. another $225,000 created additional financial problems for the corporation. The bankrupt had anticipated using these funds to pay for the merchandise which John Licht, Inc. had bought on extended credit terms and had sold at or below cost in order to pay off the Franklin loan (A 148). The situation was further aggravated by the fact that in November, 1966, A.C., one of the corporation's major suppliers, refused to extend any further credit to it and stopped shipping it merchandise (A 264).

A.C. had a system of rebates pursuant to which it granted its distributors a discount of 10% over and above its regular discount, for selling its merchandise to accounts which it designated. Distributors, such as John Licht, Inc., were not restricted in their sales of A.C. products, but they would only get the additional discount on A.C. merchandise if it was sold to the designated accounts (A 171-174 and A 217-210).

In order to obtain the extra 10% discount on sales of A.C. merchandise, the bankrupt caused the books

of John Licht, Inc. to be falsified so as to indicate sales to designated accounts, which were actually being made to non-designated accounts. This was accomplished by what the bankrupt called "pre-invoicing," i.e., the creation of fictitious invoices to designated accounts prior to the receipt of the merchandise from A.C. On receipt of the merchandise, it would be sold to non-designated accounts. The books of John Licht, Inc. would reflect the fictitious sales to designated accounts, while the actual sales would be entered on sheets of paper kept on a clipboard. When payments were received, they were credited to the designated accounts which had been charged. This scheme was used to conceal sales to non-designated accounts from the A.C. auditors who periodically checked the books of John Licht, Inc. (A 171-182).

In the latter part of 1966, the bankrupt caused John Licht, Inc. to create approximately $120,000 in fictitious accounts receivable to designated accounts, even though no merchandise had been shipped to John Licht, Inc. by A.C. (A 183-192, A 95-96 and A 143).

In August, 1966, the bankrupt gave five notes of John Licht, Inc., signed by him in blank, to Sy Lichten ("Lichten") the principal of Admiral. This was done in order to raise money to discharge the Franklin loan. This series of accomodation notes were to be filled in by Lichten for a total of $100,000 and discounted by Admiral, which was to turn the moneys over to John Licht, Inc. Shortly after executing the notes, the bankrupt was told by Lichten that Admiral had not been able to discount the notes and that they had been destroyed. However, in January or February, 1967, Franklin informed the bankrupt that the first of this series of notes had been presented for payment and that there were insufficient funds in the corporation's account to pay it (A 145-151).

In order to raise additional funds to meet the corporation's pressing obligations, the bankrupt commenced negotiations with Transamerica Financial Corporation ("Transamerica") in February, 1967. On March 1, 1967, the bankrupt caused John Licht, Inc. to enter into an agreement

with Transamerica whereby the corporation received a loan of $400,000 and as security for the payment of the loan, John Licht, Inc. mortgaged the real estate which it owned and assigned its inventory and accounts receivable to Transamerica (A 140-143).

At no time prior to entering into the agreement with Transamerica did the bankrupt inform Transamerica that approximately $120,000 of the receivables assigned to it were fictitious (A 214-216).

When the corporation's financial difficulties continued to mount, the bankrupt consulted Michael Berman, Esq., an insolvency expert, some time prior to April 19, 1967. Mr. Berman caused an audit of the corporation's books and records to be made by Leon I. Radin & Company, Certified Public Accountants, after which several meetings of creditors were called by John Licht, Inc. (A 163, 268 and 272).

On April 19, 1967, the Board of Directors of John Licht, Inc. authorized it to file a petition for an arrangement pursuant to Chapter XI of the Bankruptcy Act

and such a petition was filed on June 1, 1967 (A 274 and A 121). At no time after retaining Mr. Berman, did the bankrupt advise either Mr. Berman or the accountants that there were approximately $120,000 in fictitious accounts receivables on the books and records of John Licht, Inc. The financial statement prepared by the accountants and presented to creditors at one of the several meeting, included said $120,000 in fictitious accounts receivable as an asset of the corporation, as did the schedules filed with the Chapter XI petition of John Licht, Inc. (A 166-169).

Since the bankrupt and his father, John Licht, had guaranteed the accounts of many of its suppliers, they both filed individual petitions for arrangements on June 8, 1967. Neither John Licht, Inc. nor the individual debtors were able to propose a plan and they consented to be adjudicated bankrupts on July 11, 1967 (A 268-269).

Proceedings Below

Specifications of objection to the discharge of the bankrupt herein were filed by the trustee on March 6, 1970 (A 4-9). After extensive pre-trial discovery, consisting of comprehensive interrogatories, answers to interrogatories and supplemental answers to interrogatories, the trial of the specifications commenced on June 9, 1972 and continued on June 16, August 9 and August 18, 1972. Prior to the trial and on March 30, 1971, the bankrupt moved to dismiss specifications "1" and "2" on the ground that they were insufficient as a matter of law since they alleged offenses which had been committed in the corporate bankruptcy proceeding and not in the individual proceedings. The motion to dismiss was denied by Judge Price and said denial was affirmed on review by Judge Costantino, on January 20, 1972 (A 2).

After conclusion of the trial and on November 2, 1972, the trustee moved, pursuant to Fed. R. Civ. P. 15(b)

to amend specifications "1(b)" and "2(g)" to conform to the proof and evidence. (A 10-21).

By order dated April 4, 1974, Judge Price granted the motion to amend specifications "1(b)" and "2(g)". (A 253-262). By memorandum decision dated April 4, 1973 and order dated April 17, 1973, Judge Price denied the bankrupt's discharge, sustaining specifications "1(b)" and "2(g)". (A 248-296 and A 297).

Accordingly, the only specifications involved in this appeal are specifications "1(b)" and "2(g)", which in their original form, read as follows:

> "1. The bankrupt has committed an offense punishable by imprisonment as provided under Title 18, United States Code, Section 152 in that the bankrupt ... (b) in contemplation of the bankruptcy proceeding of John Licht, Inc. knowingly transferred to himself property of John Licht, Inc., to wit: The bankrupt obtained coupons, points, premiums and/or merchandise stamps belonging to John Licht, Inc. and entitling it to various merchandise, and used same to his own benefit and account for the acquisition of, among other things, clothing carpeting, living room furniture,

> dining room furniture, a television, a typewriter, a stereo outfit, a bar and lamps without paying said corporation consideration therefor.
>
> '2. The bankrupt has committee an offense punishable by imprisonment as provided under Title 18, United States Code, Section 152, in that, in contemplation of the filing of the bankruptcy of John Licht, Inc., the bankrupt knowingly and fraudulently falsified or made a false entry in documents affecting or relating to the property or affairs of said John Licht, Inc., to wit: ...
> (g) Entries were made in the books of John Licht, Inc. representing returns of merchandise to said Company, none of which were actually received by it."

The bankrupt then petitioned for review of the order granting the amendments and the order denying his discharge. By memorandum decision and order dated February 14, 1974, Judge Costantino dismissed the bankrupt's petitions for review and affirmed the orders of Judge Price in all respects. (A 298-306).

Questions Presented

1. Did both the bankruptcy court and the district court err in allowing the trustee to amend his specifications "1(b)" and "2(g)"?

a) Do the amendments to specifications "1(b)" and "2(g)" merely amplify and clarify the original specifications or do they constitute wholly new and separate specifications of objection to discharge?

b) Has the bankrupt been prejudiced, misled or surprised by the amendments or the proof offered at the trial in connection with these specifications?

2. Are the findings of fact of the bankruptcy court, as affirmed by the district court, clearly erroneous?

a) Did the trustee establish that there are reasonable grounds for believing that the bankrupt committed the acts complained of in specifications "1(b)" and "2(g)"?

b) Did the bankrupt fail to meet his burden of proving that he did not commit said acts?

3. Did the bankrupt fraudulently transfer property of John Licht, Inc. to himself in contemplation of bankruptcy?

4. Did the bankrupt make false entries on the books and records of John Licht, Inc. after bankruptcy?

5. Is this bankrupt entitled to the privilege of a discharge?

POINT I

Granting The Trustee's Motion To Amend Was Proper

A. The Amendments To Specifications "1(b)" And "2(g)" Merely Amplify And Clarify The Original Specifications And In No Way Prejudiced, Misled Or Surprised The Bankrupt.

After the conclusion of the trial, it became apparent to the trustee that the word "fraudulently" had been inadvertently omitted from specification "1(b)", i.e., the specification alleged that the bankrupt "knowingly" transferred property belonging to John Licht, Inc. in contemplation of bankruptcy rather than that the transfers were made "knowingly and fraudulently."

Although specification "2(g)" alleged that the bankrupt made false entries on the books of John Licht, Inc. in contemplation of bankruptcy, the proof at the trial indicated that the fictitious credit memoranda issued by the bankrupt were issued, after John Licht, Inc. had filed it petition for an arrangement.

Thus, the trustee moved, on November 2, 1972, for an order allowing him to amend specification "1(b)" so as

to allege that the transfers were made "knowingly and fraudulently" and to amend specification "2(g)" so as to allege that the false entries on the books of John Licht, Inc. were made "after bankruptcy" rather than "in contemplation of bankruptcy."

The trustee's motion was made on the basis of Fed. R. Civ. P. 15(b), which reads as follows:

> "(b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

The Federal Rules of Civil Procedure are specifically made applicable in bankruptcy proceedings by General Order 37 which provides:

> "In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be."

It has long been established that amendments to conform the pleadings to the proof pursuant to Fed. R. Civ. P. 15(b), are permitted after the trial of specifications of objection to a bankrupt's discharge. In re Magen, 218 Fed. 692, 694 (E.D. Pa. 1914); and In re Lesser, 108 Fed. 205, 206 (S.D.N.Y. 1901).

At the trial herein, the bankrupt did not object to the introduction of any evidence in connection with specifications "1(b)" and "2(g)" on the grounds that the evidence was not within the purview of the specifications. Accordingly, the issues herein were tried by "implied consent of the parties." See Fed. R. Civ. P. 15(b), supra.

The Court in In re Knaszak, 151 Fed. 503, 504 (W.D.N.Y. 1907), permitted the objecting creditor to amend

his specifications so as to allege that the acts complained of "... were knowingly and fraudulently committed by the bankrupt." If specifications can be amended to permit the inclusion of the allegation that the acts complained of were "knowingly and fraudulently committed," a fortiori, a party shall be permitted to amend a specification so as to add the word "fraudulently."

As to specification "2(g)", the trustee alleged that the false entries were made in contemplation of bankruptcy, whereas the proof established that the false entries were made after bankruptcy. However, the bankrupt does not claim that he was prejudiced, misled or surprised in any way by the trustee's proof, since he had notice of the trustee's position on this specification long before the commencement of the trial. In answer to the interrogatories propounded to him by the bankrupt, the trustee made the following answer to Interrogatory No. 11 which asked for "the dates of the entries alleged to have been made in the books of John Licht, Inc., representing returns of merchandise to it, none of which was actually received by

it, setting forth the merchandise alleged to have been returned and the value thereof."

> "A. 11. The alleged false returns referred to are covered by credit memoranda dated June 20, 1967... ." (Emphasis supplied). (A 223).

As stated in Judge Price's memorandum decision, dated April 4, 1973:

> "The answers to the interrogatories were served on Melvin's attorney on February 10, 1971 so that it was evident to him that the trustee, in Specification 2(g), was relying on the fictitious credit memoranda dated June 20, 1967, some nineteen days after The Corporation had filed its petition for arrangement and not on any fictitious credit memoranda issued by Melvin in contemplation of the Corporation's petition.
>
> 'However, when Melvin's attorney made his motion to dismiss specifications 1 and 2 he did not include this ground, although it should have been obvious to him, after he received the answers to his interrogatories, that there was a discrepency between the specification and the answer. He relied on one ground alone, that the acts complained of had been committed in the corporate bankruptcy proceeding and not in Melvin's. If the former ground had been included in the motion, the trustee would have moved to correct it at that time long prior to trial.

* * *

> 'He ... takes the position that Specification 2(g) is fatally defective because the trustee proved that the fictitious entries were made after The Corporation filed its petition rather than in contemplation thereof even though he knew from the answers to the interrogatories that this is what the trustee would rely on in his proof. Nowhere in Melvin's papers on this motion or in his memoranda submitted after trial does he allege that he was prejudiced, mislead, or surprised by the trustee's proof on these specifications, rather he relies on the narrow, technical ground that the pleading is defective and cannot now be amended." Court's emphasis. (A 257-259).

To the effect that such an amendment will be granted where there is no showing that any injustice or prejudice has resulted to the bankrupt, see In re Knaszak, supra, 151 Fed. at 504; and In re Schlesinger, 31 F.2d 789, 791 (S.D. Tex. 1929) aff'd Schlesinger v. Phillips, 36 F.2d 191 (5th Cir. 1929).

The Court in the Schlesinger case, supra, stated the rule as follows:

> "The right of a creditor to amend his specifications in opposition to a bankrupt's discharge is a valuable right,

> and should be freely granted in the interest of justice. [Citing authority]. To have refused the right in this case would have been in the interest of injustice. The original specifications, while not presenting specification 5 in terms, in their general nature called for and developed the very facts on which specification 5 was based, and to have denied the creditors the right to amend their pleadings, so as to specifically charge against the bankrupt the facts which his own testimony disclosed, would have been a great abuse of judicial discretion." 31 F.2d at 791.

It is respectfully submitted that to have denied the trustee the right to amend his pleading so as to specificially charge against the bankrupt the facts which the bankrupt's own testimony disclosed, facts which were known to the bankrupt long before the commencement of the trial, would have been an abuse of judicial discretion.

Also see In re Adler, 79 F.2d 840 (2d Cir. 1935), wherein this Court found that the allegations in the specifications to the effect that a note was delivered by the bankrupt in October, 1932 instead of August, 1932 and that the order garnishing her salary was made in November,

1932 instead of September, 1932 "... was not a fatal variance and the specification should be regarded as amended to conform to the proof." 79 F.2d at 842.

The manner in which specification "2(g)" as alleged in the specifications varies from the proof is very similar to the variance in the Adler case, that is, the credit memoranda were actually issued after bankruptcy rather than before. Although the bankrupt, who caused the credit memoranda to be issued, was always aware of the fact that they were issued after bankruptcy, he never raised the issue at the trial and never objected to the introduction into evidence of the credit memoranda dated June 20, 1967. He has not been prejudiced or surprised and should not be permitted to avoid the consequences of his very serious acts, i.e., issuing false credit memoranda after the date of bankruptcy, because of what amounts to no more than a technical variance.

In the case of In re Finder, 61 F.2d 960 (2d Cir. 1932), cert. denied 289 U.S. 736 (1933), the sixth specification of objection alleged that the bankrupt transferred

funds with intent to hinder, delay and defraud creditors. However, the proof demonstrated that the bankrupt's acts amounted to a removal of assets with such intent, rather than a transfer. In allowing the specification to be amended so as to conform to the proof, this Court stated as follows:

> "While there is ample ground for allowance of the motion to amend the sixth specification, we think such a motion was unnecessary. The bankrupt was sufficiently warned in specifications fifth and sixth of the charges that were finally proved against him. The principal facts (including the allegations of intent to hinder, delay and defraud creditors) were plainly set forth in these specifications. Whether the purchase and use of a round-trip ticket and the withdrawal of funds for the Florida excursion involved a 'transfer, removal, destruction' or 'concealment' was largely a question of law. That the objecting creditor characterized the transactions as transfers rather than removals, destructions or concealments and failed to present in his specifications the proper theory for barring the discharge, was not a fatal variance. The specification may be deemed amended so far as necessary to conform to the proof." 61 F.2d at 962.

As in the Finder case, the bankrupt herein "was sufficiently warned ... of the charges that were finally proved against him." The "principal facts" were set forth in specifications "1(b)" and "2(g)". Also see In re Lauria, 18 F.Supp. 984 (S.D.N.Y. 1935).

Accordingly, Judge Price correctly allowed the amendment, which, in this case, is obviously in the interests of justice. Judge Costantino affirmed the decision of Judge Price, adding that:

> "... amendments which merely amplify or clarify the original pleadings are permitted. [Citing authorities]. (A 303).

B. The Bankrupt Misconstrues The Rule On Amendments.

The bankrupt argues that the proposed amendments should not be permitted in view of General Order 32, which provides as follows:

> "Any person opposing a discharge shall, on or before the time fixed for the filing of objections to the discharge, file a specification in writing of the grounds of his opposition."

The bankrupt claims that the allowance of the amendments would create an extension of time to file specifications contrary to General Order 32. Therefore, the bankrupt concludes that Fed. R. Civ. P. 15(b) is not applicable in a bankruptcy proceeding because it is inconsistent with General Order 32. See General Order 37, supra.

In an attempt to show that Fed. R. Civ. P. 15 is inconsistent with General Order 32, the bankrupt cites the following cases: In re Atlas Sewing Centers, Inc., 336 F.Supp. 684 (S.D. Fla. 1972); In re Shulund, 210 F.Supp. 195 (D. Mont. 1962); United States v. Verrier, 179 F.Supp. 336 (D. Me. 1959); and In re Cardinal Service Corporation, 175 F. Supp. 74 (S.D.N.Y. 1959). (See Appellant's Brief at 17). However, none of these cases involve Rule 15. The issue which the bankrupt raises has been decided adversely to his position, i.e., Rule 15 has been found to be consistent with General Order 32. See In re Taub, 98 F.2d 81 (2d Cir. 1938), and In re Black & White Cab Co., 35 F. Supp. 832 (W.D. Mo. 1940).

The Court in In re Sturdevant, 415 F.2d 465 (5th Cir. 1969), dismissed this very argument, by concluding as follows:

> "Bankrupt, however, contends that objections to discharge are not to be judged by the standards of the federal rules because of General Order 32 and Official Form in Bankruptcy No. 44. The provisions require the filing of a 'specification in writing' of such objections, but as the Referee pointed out they contain no suggestion of the type of allegation which must be contained in the specification. They contain no different or more onerous standard of pleading than that imposed by the Federal Rules of Civil Procedure. Thus by virtue of General Order 37, the standard to be applied in determining whether or not to allow amendment of an objection to discharge is the standard of Rule 15(a) Fed. R. of Civ. P., which requires that leave to amend be freely given 'when justice so requires.' [Citing authorities]." 415 F.2d at 467.

In accordance with the liberal amendment provisions contained in Rule 15, Judge Price and Judge Costantino correctly allowed the amendments, which in this case are in the interests of justice.

C. The Cases Cited by the Bankrupt are Inapposite.

It is well settled that "... objections may be amended to conform to the proof." Collier, On Bankruptcy, Vol. 1A, ¶14.07 at 1296.1 - 1296.2 (14th ed. 1972).

Although the bankrupt cites a wealth of case law on the question of when a specification of objection to a bankrupt's discharge may be amended, all of the cases cited involve either an original specification stated in the general terms of the statute or a proposed amendment which sets forth a wholly distinct basis for objection.

In re Hixon, 93 Fed. 440 (S.D. Iowa 1899) involved specifications which were "stated substantially in the words of the statute... ." 93 Fed. at 441. The specifications did not inform either the Court or the bankrupt of the grounds which were charged and could not be termed specifications but were "plainly and grossly generalizations." In the instant case, there is no question that the trustee's

original specifications informed both the Court and the bankrupt of the grounds thereof.

In re Grossberg, 11 F.2d 329 (S.D. Fla. 1926) and In re Siegel, 55 F. Supp. 709 (E.D.N.Y. 1944), are also cases which involve general specifications worded in the language of the statute. In the Grossberg case, no attempt was ever made to amend the specifications, while in the Siegel case, the Court allowed the trustee's amendment so as to further particularize the original specifications which were in general terms. In fact, since the adoption of the Federal Rules of Civil Procedure, with the liberal amendment provisions contained in Rule 15, the trend has been to allow even general specifications to be amended. Collier, On Bankruptcy, Vol. 1A, ¶14.07 at 1296, fn. 47 (14th ed. 1972). Accordingly, neither the Hixon nor the Grossberg cases, supra, can be cited as authority for the narrow issue involved therein, since they were decided before the Federal Rules of Civil Procedure were enacted. However, the original specifications in this case

were not stated in general terms, but were very specific. Moreover, they were supplemented by extensive answers to interrogatories. The bankrupt herein cannot and does not claim that he was not aware of the charges against him.

Most of the remaining cases cited by the bankrupt involve proposed amendments that sought to interpose wholly new and distinct specifications. See Stanley's Incorporated Store No. 3 v. Earl, 28 F.2d 611 (8th Cir. 1928) cert. denied, 278 U.S. 637 (1928), wherein the objecting creditor's motion to amend his specifications "... by adding entirely new grounds and raising new and different issues" was properly denied. 28 F.2d at 611.

In the case of In re Hurowitz, 14 F.Supp. 71 (D. Mass. 1935), "the objecting creditor filed an amendment by way of substituted specifications which set forth new grounds of objection wholly distinct from those originally specified." The specifications "... were in no way related to any of the grounds set forth in the original specification." 14 F.Supp. at 71. The Court stated the rule as to permissible amendments as follows:

> "It does not follow that amendments may not be allowed if their purpose is to clarify the grounds or to bring them into conformity with the language of the statute."
> 14 F.Supp. at 71

A review of the trustee's proposed amendments will indicate that the amendment to specification "1(b)" was for the purpose of conforming it to the language of the statute and that "2(g)" was amended for the purpose of clarification. No new facts and no new basis were set forth in either specification.

The bankrupt cites the case of Northeastern Real Estate Securities Corporation v. Goldstein, 91 F.2d 942 (2d Cir. 1937), as the leading authority in this Circuit on the question of amendment of specifications. In the Northeastern case, the lower court allowed those amendments which merely amplified or clarified the original specifications and only disallowed those amendments which "... were wholly new and separate occasions of wrongdoing... ." 91 F.2d at 943.

This rule was properly applied by Judge Price in this case since the trustee has not sought to interpose any "wholly new and separate occasions of wrongdoing," but has merely amplified and clarified the original specifications. In fact, Judge Costantino cites the Northeastern case as authority for his decision (A 303).

Although the bankrupt's discharge was granted in the case of In re Taub, supra, 98 F.2d 81, the objecting creditor was permitted to amend his specifications. In Taub, this Court cited the Northeastern case, supra, as authority for the following proposition:

> "The amendment did not present a new ground of objection; it merely cured a defective statement of the old objecti on and conformed it to the statutory requirements. It caused neither delay nor surprise to the bankrupt. The district judge was clearly correct in allowing it." 98 F.2d at 82.

The amendment in the Taub case inserted the phrase "knowingly and fraudulently" into the original specification. The amendment to specification "1(b)" herein only added the word "fraudulently," and a fortiori was permissible.

In the case of In re Johnson, 192 Fed. 356 (D.S.D. 1911), the proposed amendment was denied on the ground that it "sets out entirely new matter constituting an additional, separate and independent objection to the discharge of the bankrupt." (Emphasis supplied). 192 Fed. at 358.

The Judge in In re De Cillis, 83 F.Supp. 802 (D. Mass. 1949), denied the bankrupt's discharge on an entirely new ground which had not even been specified by the objecting creditor. The Court properly found that the bankrupt's discharge could not be denied on this new basis. However, in discussing the original specification which was interposed in the general language of the statute, the Court concluded as follows:

> "Averments in the objection should be more specific than the general language of the statute. [Citing authorities]. However, nowhere in the record can I find that any exception was filed to the specification. If no exception had been filed and there was hearing [sic] on the merits, any defect in the form of the specification would be deemed to be waived." 83 F.Supp. at 804.

Accordingly, the matter was remanded to the Bankruptcy Judge.

In the instant case, the bankrupt never objected to the evidence submitted at the trial herein in connection with the specifications. Therefore the technical inaccuracies which were cured by the amendments to the specifications, had actually been waived by the bankrupt. In fact, the Court in In re Beam, 163 F.Supp. 333, at 334 (N.D. Ala. 1958), held that the bankrupt had waived any objection to the form of the specifications by submitting to a hearing on the merits thereof, as was done in the instant case.

In re Biro, 197 F.2d 386 (2d Cir. 1939), also involved a so-called "amendment," which actually interposed a completely new and separate objection.

In Richey v. Aston, 143 F.2d 442 (9th Cir. 1944), the denial of the bankrupt's discharge was affirmed. This case merely holds that when the ground of objection is only discovered after the time for filing specifications of objection to discharge has expired, but before the bankrupt is granted a discharge, the new ground for objection may be pleaded, if prior discovery has been prevented by the

bankrupt's fraud. Accordingly, it is completely irrelevant, since it did not even involve the question of amendment.

The above discussion of the cases cited by the bankrupt demonstrates that amendments to specifications of objection to discharge are not permitted where wholly new, distinct and separate grounds are sought to be interposed after the time for filing specifications has expired. Amendments to clarify or amplify the original specifications or make the original specifications comply with the provisions of the statute are permitted. This is all that the trustee attempted to do in this case and accordingly allowance of the amendments was proper.

Point II

THE FINDINGS OF FACT OF THE BANKRUPTCY COURT, AS AFFIRMED BY THE DISTRICT COURT, ARE NOT CLEARLY ERRONEOUS

The findings of fact of the Bankruptcy Judge, as affirmed by the District Court, should not be distrubed unless "clearly erroneous." General Order 47 of the General Orders of the Supreme Court.

In In re Freelove, 74 F.Supp. 666 (S.D. Calif. 1947), the Court stated this rule as follows:

> "The findings of a Referee should not be distrubed unless they are clearly wrong. [Citing authorities] ... [T]he decision of a Referee in granting or denying discharge calls for the exercise of sound discretion on his part and should not be disturbed except for gross abuse. [Citing authorities]." 74 F.Supp. at 667.

To the same effect also see Mazer v. U.S., 298 F.2d 579 (7th Cir. 1962) and Arenz v. Astoria Sav. Bank, 281 Fed. 530 (9th Cir. 1912).

The findings of fact in the instant case are not clearly erroneous. Judge Price had the opportunity to hear and observe the demeanor of the only witness, the bankrupt, and found his testimony lacking in credibility. (A 277). Also see Carter Oil Co. v. McQuigg, 112 F.2d 275 (7th Cir. 1940) and In re Freelove, supra.

As to the trial judge's opportunity to observe the witnesses, the Court in the Freelove case, supra, stated as follows:

> "... The Referee was free to draw his own inferences from the facts testified to, he was free to question the plausibility of the attempted explanations by the bankrupt and the other witnesses who were called to give their version of the facts relating to the two transactions. The appearance of the witnesses, including the bankrupt, the manner in which they testified, their bias, and interest, and other matters affecting their credibility were matters for the Referee alone. And as his ultimate conclusion against discharge does not show any gross abuse of the discretion which is lodged in him in ruling on this matter, it should not be disturbed." 74 F. Supp. at 667.

In the case of In re Beeson, 335 F. Supp. 636, at 641 (W. D. Ark. 1972), the Court indicated that:

> "It is immaterial how this Court would have decided the case from the same voluminous records, exhibits and testimony. As already stated, the question is whether there is substantial evidence to support the findings of the Referee. The able and experienced Referee has no doubt given the matter his most careful attention and consideration. This Court is satisfied and concludes that the Referee's findings and conclusions were decided on the basis of substantial testimony presented to him during the course of the hearings at which time he had an opportunity to observe the witnesses, review the exhibits and consider the contentions of the respective parties.

'In Fort Smith Acoustical Company (W.D. Ark. 1970), 310 F. Supp. 226, aptly stated:

'Everyone forms his conclusions from testimony, not only from the words which he hears the witnesses utter but from their appearance when they utter them,'***."

The findings of fact in the instant matter, as affirmed by the District Court, are not "clearly erroneous," rather, they are supported by substantial evidence.

In any event, the ultimate burden of proof in a discharge proceeding is on the bankrupt. Section 14c of the Bankruptcy Act provides, in relevant parts, as follows:

"That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision c, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt."*

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* This section has now been changed by Rule 407 of the Rules of Bankruptcy Procedure, which were not promulgated until after the trial of this matter and accordingly, are not applicable to this appeal.

To the same effect, see Mazer v. U.S., supra, and In re Beck, 43 F. Supp. 526 (S.D.N.Y. 1942), aff'd 130 F.2d 903 (2d Cir. 1942).

Even if the evidence is in a state of "substantial equilibrium," the bankrupt's discharge must be denied "... on the ground that the bankrupt failed to carry his burden of proof." In re Rolland, 43 F. Supp. 208 (E.D. La. 1942). Also see Gunzburg v. Johannesen, 300 F.2d 40 (5th Cir. 1962) and In re Barbiere, 97 F. Supp. 86 (E.D. Pa. 1951), aff'd. 192 F.2d 1018 (3d Cir. 1951).

The nature of the inquiry and the scope of review in a discharge proceeding was adequately set forth in the case of In re Margolis, 23 F. Supp. 735 (S.D.N.Y. 1937), as follows:

> "... If a prima facie case be made and the bankrupt fails to furnish a satisfactory explanation, the court has no discretion. Its duty is mandatory. It must deny a discharge. [Citing authorities].
>
> 'Within the rules of law mentioned, there are, therefore, but two inquiries: (1) Did the trustee make out a prima facie

> case? (2) If so, has the bankrupt exculpated himself from it? Both raise issues of fact. The answers to them depend exclusively on the evidence." 23 F. Supp. at 737.

A review of the evidence will indicate that there are reasonable grounds for believing that the bankrupt committed the acts complained of, and that the bankrupt failed to meet his burden of proving that he did not commit said acts.

Point III

THE BANKRUPT FRAUDULENTLY TRANSFERRED PROPERTY OF JOHN LICHT, INC. TO HIMSELF IN CONTEMPLATION OF BANKRUPTCY

Two of the major suppliers of John Licht, Inc., the Thermoid Division of the H. K. Porter Company ("Thermoid") and AC had sales promotion plans to increase the sales of their products, which had been in existence for several years prior to the institution of this proceeding. Under these plans, John Licht, Inc. could either earn points, premiums or coupons or purchase them at a discount, depending on the volume or type of business which it did with these suppliers.

The points could then be redemmed for merchandise (A 28 and A 42-51). The points were to be given by John Licht, Inc. to either its customers or its sales employees so as to stimulate the sales of Thermoid and AC products. (A 45-47).

The bankrupt admits that he took points valued at $16,000 belonging to John Licht, Inc. during the two year period prior to June 1, 1967, which were used for personal purposes. He also admits using the points to obtain a vacuum cleaner, furniture of various kinds, carpeting, linens, a camera, clothing for himself and his family, an electric built-in oven, a radio and stereo components in the period from January 16, 1966 through April 28, 1967. (A 28-42, A 52-72, A 105-116 and A 224-230).

Accordingly, the trustee demonstrated that there are reasonable grounds for believing that the bankrupt had committed the acts complained of in specification "1(b)".

The bankrupt failed to meet his burden of proving that he did not commit said acts. He attempted to meet his burden by claiming that he did not take the points "in

contemplation of bankruptcy" and that the points were taken by him as additional compensation for services rendered to John Licht, Inc.

As to whether the transfers of the points were made "in contemplation of bankruptcy," Judge Price carefully examined all of the facts and circumstances and concluded:

> "... Melvin used The Corporation's AC coupons to order the last two items on April 20 and 28, 1967. They consisted of a Fisher stereo amplifier for 50,130 points, ordered on April 20, 1967 and marked Trustee's Exhibit 22 and a Dual turntable with base, a cartridge and a Fisher Multiplex for 84,562 points, ordered on April 28, 1967 and marked Trustee's Exhibit 23. The question is, when he ordered these stereo components did Melvin contemplate that The Corporation would file a bankruptcy proceeding?
>
> 'The answer must be yes. An examination of the petition for an arrangement filed in this Court by The Corporation reveals that it was obviously prepared in April, 1967. It was ostensibly executed on June 1, 1967 but all of the dates were originally typed in as April, crossed out, and changed to June. The corporate secretary's certificate, signed by Melvin, alleges that on April 19, 1967 the Board

of Directors deemed 'it desirable and in the best interests of this corporation, that a petition be filed proposing an arrangement under the provisions of Chapter XI of the Bankruptcy Act, and that either John Licht as president, or Melvin Licht, as vice president, be and either one of them are hereby authorized to execute all necessary papers for that purpose.' It went on to authorize the retention of Michael Berman, Esq., of 55 Liberty Street, New York, New York, for the purpose of filing the said petition for an arrangement, and to take all necessary steps to carry out the same.'

'It is evident therefore, that Melvin must have consulted Mr. Berman concerning The Corporation's financial problems prior to April 19, 1967 after which they must have come to the conclusion that it would be necessary for The Corporation to seek relief under Chapter XI of the Bankruptcy Act. Melvin must have known what its financial condition was at the time The Corporate Resolution was executed. In my opinion, his testimony that he did not know what its financial condition was until after the audit by Leon I. Radin and Company is palpably untrue because the audit was as of April 25, 1967, some six days after The Corporation had been authorized to seek relief under the Bankruptcy Act. The report prepared by the accountants was marked Trustee's Exhibit 25 and it shows that The Corporation was hopelessly insolvent. It had assets of $666,347.58 against liabilities

> of $1,528,860.09 for a capital deficiency of $862,512.51 and that it had suffered a net loss of $647,647.76 in the four month period from January 1, 1967 to April 25, 1967. It is inconceivable to me that as the general manager of The Corporation, in complete charge of its operations, that Melvin did not know that its financial condition was desperate when he consulted Mr. Berman and that he learned of it only after the audit. If his testimony to that effect is true why was The Corporate Resolution adopted on April 19, 1967, six days before it was completed? When Melvin ordered the stereo components on April 20 and 28, 1967 (Exhibits 22 and 23) he knew that The Corporation was going to file a petition for an arrangement and they were ordered "in contemplation" of that filing under the Bankruptcy Act." Court's emphasis. (A 274-276).

Judge Price's conclusions are in accord with the decision in Butler v. U.S., 310 F.2d 214, at 218 (9th Cir. 1962), wherein the conviction of the defendants for bankruptcy fraud under 18 U.S.C. §152 was upheld as the evidence established that the defendants had received the transfers "... after the decision to file the petition in bankruptcy for [the corporation] had been made."

As to the bankrupt's claim that the points were received by him as "additional compensation," he admitted

that the value of the points received by him during the years 1966 and 1967 was not reported by him as income on his tax returns. (A 130-131). Although the bankrupt admitted testifying in the bankruptcy proceeding in 1967 that the points were taken by him as compensation and although there was a discussion of possible tax liability on his part at that time, in preparing his 1967 return, in 1968, he did not include this "additional compensation." In fact, it was only after the Internal Revenue Service was informed of his testimony by the trustee and after being called in by the Internal Revenue Service in 1972, did he consent to an audit change which increased his reported income for 1966 by $8,605 and increased his reported income for 1967 by $7,825. (A 132-138). Nor were the transfers reflected as compensation on the books and records of John Licht, Inc. (A 131). The manner in which the bankrupt treated the transfers on his own books and records "... has a bearing upon the question of [his] intent and good faith ..., as it shows how he acted or failed to act with reference to a principal fact." White v. Benjamin, 150 N.Y. 258 at 267 (1896).

The Court in a discharge proceeding is not obligated to accept the uncorroborated testimony of the bankrupt, even if there is no contradictory testimony. In re Wilson, 19 F. Supp. 807 (S.D.N.Y. 1937), aff'd 95 F.2d 1023 (2d Cir. 1938). Also see In re Leslie, 119 Fed. 406 (N.D.N.Y. 1903), wherein the Court noted that a witness may be discredited by the improbability of his testimony. It is respectfully submitted that in light of the circumstances surrounding this transaction, the bankrupt's unsupported testimony that he received the points as additional compensation, is, at best, highly improbable.

Judge Price, who as the trier of facts, had the opportunity to observe the demeanor of the witness, failed to believe his testimony to the effect that he did not know that he was required to include the value of the coupons in his income tax returns if it was "additional compensation." Accordingly, the learned Bankruptcy Judge stated:

> "Melvin is a shrewd, sophisticated, businessman who, by his own admission, operated a business which involved hundreds of thousands of dollars. He is not a poor

> wage earner who might not know that he was required to report, as additional income, some minimal premiums which he might have received. The 'additional compensation' Melvin received in this manner was over $8,000 in 1966 and almost $8,000 in 1967, which is more than he was supposed to be earning as salary for The Corporation in those years.
>
> 'In my opinion, Melvin knowingly and fraudulently transferred to himself the points necessary to obtain the stereo components covered by the orders of April 20 and 28, 1967, (Exhibits 22 and 23) at a time when he had decided, as the operating officer of The Corporation that it should file a petition for an arrangement pursuant to Chapter XI of the Bankruptcy Act. These components could hardly have been for his own use for he had ordered <u>two</u> turntables, <u>two</u> cartridges and a Fisher stereo multiplex for a total of 109,814 points on December 6, 1966, less than four months before, which were delivered to him (Exhibit 18). The orders represented by Exhibits 22 and 23 were his way of divesting The Corporation of the value of the points and syphoning it to himself, a course of action in which he was evidently successful since he testified that when it was adjudicated a bankrupt it had no points left (S.M., August 18, 1972 p. 31)." Court's emphasis. (A 277-278).

In deciding the question of whether the acts complained of in specification 1(b) were committed in contemplation of bankruptcy, Judge Price took judicial notice of the

fact that the secretary's certificate annexed to the petition for an arrangement filed by John Licht, Inc. authorized the corporation to file such a petition as early as April 19, 1967. The corporation's petition for an arrangement and the documents annexed thereto are a part of the Court's file in this related proceeding and there is no question that the Court could and did take judicial notice of the official documents contained in its files. (A 120-121 and A 305). Moreover, the fact that the bankrupt had executed this certificate on April 19, 1967, demonstrates the bankrupt's lack of credibility, since at the discharge trial he testified that he never contemplated bankruptcy until some time in May, 1967 (A 272 and A 274).

Moreover, Judge Price found that the bankrupt had used the corporation's points to purchase the same type of stereo equipment shortly before taking the items in question and therefore correctly concluded that the bankrupt was not taking the points as additional compensation for his own use, but rather to rape the corporation of any remaining points under the incentive programs, before it went into

bankruptcy. The Bankruptcy Judge did not find as the bankrupt would have this Court believe, that the points taken by the bankrupt in prior years, were taken as additional compensation. He found that all of the points taken by the bankrupt were fraudulently converted from the corporation, but that since the practice had been going on for several years prior to bankruptcy, the fraudulent conversion of the other points was not in contemplation of bankruptcy. As to the points taken after executing the secretary's certificate on April 19, 1967, he correctly found that these were taken in contemplation of a bankruptcy proceeding.

The bankrupt attempts to excuse his conduct on the ground that the value of the items taken after bankruptcy was contemplated was small in relation to the value of the merchandise appropriated by the bankrupt over the previous two year period. The fact remains that the bankrupt diverted expensive stereo components after contemplating bankruptcy. This is so regardless of the fact that the bulk of the merchandise converted by the bankrupt under the corporation's incentive program was converted before it

contemplated bankruptcy. In any event, the value of the merchandise is not controlling. See Duggins v. Heffron, 128 F.2d 546 (9th Cir. 1942) and In re Scher, 21 F. Supp. 441 (E.D.N.Y. 1937). In the Scher case, the bankrupt sought to excuse the omission from his schedules of several claims held by him as a physician on the ground that there were only a few small bills outstanding which he would have settled for the sum of $50. In dismissing this defense, the Court concluded that:

> "The inescapable conclusion of the referee that these sums, however small, should have been listed, must be sustained." 21 F. Supp. at 441.

Thus, the value of the merchandise converted after the bankrupt contemplated bankruptcy is not controlling.

It is respectfully submitted that Judge Price's decision sustaining specification "1(b)," which was affirmed by the District Court, should be affirmed in all respects by this Court, since it is supported by substantial evidence.

Point IV

THE BANKRUPT MADE FALSE ENTRIES ON THE BOOKS AND RECORDS OF JOHN LICHT, INC. AFTER BANKRUPTCY

Specification "2(g)" charges the bankrupt with causing false entries to be made in the books of John Licht, Inc., after it had filed its Chapter XI petition. As previously discussed, the bankrupt caused $120,000 in fictitious accounts receivable to be put on the books of John Licht, Inc. in October, November or December, 1966. These fictitious accounts receivable remained on the corporation's books until June 20, 1967, when the bankrupt issued credit memoranda to the customers named therein to wipe them off its books.

The bankrupt admitted that the invoices creating the accounts were fictitious and that when he ordered the credit memoranda to be issued they were for merchandise which was not returned to John Licht, Inc. (A 154-157, A 196-216 and A 239-244). The bankrupt merely made up the credits out of his head (A 157). Two of the credit memoranda,

for $21,000 and $18,215.91 respectively, were issued to companies which employed the bankrupt after the bankruptcy of John Licht, Inc. (A 27, A 239 and A 243). Thus, Judge Price held that:

> "The trustee proved all of the elements required by the seventh paragraph of Section 152 of Title 18, to wit, that:
>
> '1. The Corporation had filed a bankruptcy proceeding, its petition for an arrangement, on June 1, 1967.
>
> '2. On June 20, 1967 Melvin knowingly and fraudulently caused the credit memoranda to be issued aggregating some $120,000.
>
> '3. He knew that no merchandise listed in the credit memoranda had been or would be returned to The Corporation.
>
> '4. The entries in these documents were false.
>
> '5. They affected and related to The Corporation's property." (A 281-282).

Since the bankrupt did not offer an adequate explanation for the issuance of the false credit memoranda after bankruptcy, Judge Price had no alternative but to sustain specification "2(g)."

Point V

THE BANKRUPT HEREIN IS NOT ENTITLED TO THE PRIVILEGE OF A DISCHARGE

A discharge is not a matter of right, nor is its refusal the imposition of a penalty or forfeiture; it is denied when a bankrupt has not performed the conditions precedent to his obtaining a discharge. See In re Leslie, supra.

As stated by the court in In re Stine, 60 F. Supp. 703, at 706 (E.D. Mo. 1945):

> "[D]ischarge in bankruptcy is a privilege which a bankrupt is not entitled to unless he deserves it. A discharge is intended to relieve misfortune, but it must be misfortune coupled with absolute honesty."

To the same effect, see Williamson v. Williams, 137 F.2d 298 (4th Cir. 1943).

In Paton v. England, 462 F.2d 1099, at 1100 (9th Cir. 1972), the rule was stated as follows:

> "... the court, over the years, has frequently pointed out that the Congressional solicitude is limited to, and the prophylactic benefit of a discharge is exclusively reserved for, 'the honest and unfortunate

> debtor... .' The purpose being to afford him 'a new opportunity in life and a clear field for future effort unhampered by the pressure and discouragement of a pre-existing debt.' Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S. Ct. 695, 699, 78 L. Ed. 1230 (1934). There can be no doubt of the power of Congress to discriminate between the worthy and unworthy debtor with respect to the matter of discharge. Hanover National Bank v. Moyses, 186 U.S. 181, 192, 22 S. Ct. 857, 46 L. Ed. 1113 (1902)" (Emphasis supplied).

After carefully analyzing the evidence and having observed the demeanor of the bankrupt, who was the only witness, Judge Price concluded that he is not the honest bankrupt worthy of a discharge.

> "Melvin is a bankrupt who admitted, on the trial of these specifications, that during his entire business career he caused The Corporation to "pre-invoice" AC merchandise. "Pre-invoicing" was his euphemism for falsifying The Corporation's books in order to obtain an additional discount of 10% from this supplier. At no time did The Corporation's books accurately reflect the AC transactions recorded therein. He also admitted that after he falsified his accounts receivable to the extent of some $120,000 in October, November, or December, 1966 by the preparation of fictitious invoices for merchandise which he never received from AC, he assigned all his accounts receivable, including the fictitious

ones, to Transamerica, on March 1, 1967, as partial security for the $400,000 loan without informing it that the fictitious accounts were worthless. He admitted further, that when he consulted Mr. Berman he did not tell him or Leon I. Radin & Company, the certified public accountants retained by him to make an audit of The Corporation's books, that it was carrying $120,000 in fictitious accounts receivable therein. He was silent while the accountants examined the books and prepared their report as of April 25, 19[illegible] which was shown to The Corporation's creditors at meetings called by Mr. Berman to attempt an adjustment of its financial difficulties which contained a figure for accounts receivable which was inaccurate by $120,000 (S.M., June 16, 1972, pp. 131-135 and Trustee's Exhibit 25.) His explanation was that he 'didn't know what the total amount was.' (id. p. 133). The same inflated figure $426,481.85 for its accounts receivable was used by The Corporation in its summary of assets and liabilities attached to its petition for arrangement which was signed by Melvin. It was only when The Corporation's adjudication was imminent that it occurred to him that these fictitious accounts should be eliminated by the issuance of the credit memoranda which were the basis for Specification 2(g).

'During the course of the trial on the specifications of objection I was able to observe his demeanor on the witness stand. His testimony contained many

> inconsistencies, some of which I have referred to in this opinion. He impressed me as a person who would do anything or say anything which was expedient at the moment irrespective of its accuracy. He is hardly the honest debtor who is entitled to the consideration and compassion referred to in the cases cited above."

CONCLUSION

The order of Judge Price dated April 4, 1973 granting the trustee's motion to amend his pleadings and the order of April 17, 1973 denying the bankrupt a discharge as affirmed in the memorandum decision and order of Judge Costantino, dated February 14, 1974, should be affirmed in all respects, and this appeal should be dismissed.

Respectfully Submitted,

HAHN, HESSEN, MARGOLIS & RYAN

Of Counsel:

Harry A. Margolis
William R. Fabrizio

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

U.S. COURT OF APPEALS:SECOND CIRCUIT

LICHT,
Appellant,

against

ASH,
Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 30th day of July 1974 at 529 5th Avenue, New York

deponent served the annexed Appellee's Brief upon

Michael Berman-Attorney for Appellant

the 2 in this action by delivering ~~a~~ true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

James Steele

Print name beneath signature

JAMES STEELE

Sworn to before me, this 30th day of July 1974

Robert T. Brin